IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21879

JAMES DONALD EDWARDS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF

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I.

OUR NO-BASIS IN FACT POINT

In our Opening Brief we showed that appellant had made out a prima facie case for a conscientious objector's classification. We argued that there was no basis in fact for denying him such a classification, either in the record, or in fact.

In Appellant's Brief no effort is made to dispute our assertion of a prima facie case or that there was anything in the file, or in fact, that rebutted appellant's factual showing.

Appellee relies on its argument—in bar [failure to appeal], and is content to conclude: "It is respectfully submitted that no facts have been presented in the instant case to warrant a change in the established law:" [at the bottom of its second and final page of argument on this subject page 8].

Facts We Present.

1. Appellee correctly related that "on June 9, 1964, notice of this classification (I-A) was mailed defendant. . . No appeal from the Board's classification was taken by the defendant." (Page 5). "On October 25, 1965, defendant was again classified I-A by the Board. . ., on October 29, 1965, a notice of this classification was mailed to the defendant. No appeal was taken from the October 25, 1965, classification." (Page 6). *The dates are significant.*

2. In 1966 the President appointed a select Commission to study the operation of the then draft act. It reported in February, 1966*.

It found a number of weak spots, including ones relating to administrative appeals.

3. Immediately, by Executive Order, the following three changes were made, all bearing on the point that we now raise as our response to appellee's failure to exhaust argument: There is reason for this Court to turn a blind eye on a registrant's failure to take an appeal, in those instances when the failure occurred before the following changes:

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*Who Serves When Not All Serve? Report of the National Advisory Commission on Selective Service, Burke Marshall, Chairman, U. S. Government Printing Office, $1.50.

a. The period for an administrative appeal was changed from 10 to 30 days;

b. A new notice card (SSS Form No. 110) was formulated so stating the new, 30 day period;

c. An entirely new form (SSS Form No. 217) was developed and mailed to each registrant classified in Class I-A. It is not post-card size and in small print (as is the SSS Form No. 110), but is 8 1/2 x 11" in size, and in large type, and it informs the registrant that there is an Appeal Agent who can help him and is available for a consultation.

Also, a new letter-size form has been developed for such an appointment (SSS Form No. 218). Copies of these new forms are made part of this brief, as Appendix A, and Appendix B.

Also appended, and marked Appendix C, is a new directive of Lt. Gen. Hershey, signed March 6, 1967, and directed to Appeal Agents. Its paragraph 2 caps our argument.

This is why we contend that appellant's case should be determined on its merits, not on the now less applicable judicially-constructed bar of exhaustion of administrative remedies.

II.

OUR ADMINISTRATIVE PROCESSING POINT

Appellant showed that "panel" members of a local board are required to operate solely on their own panel's registrants; that the testimony of the chief clerk was "that what the panel members of the various panels of this local board members did in various registrant's cases could not

be distinguished." Reporter's Transcript page 11. (Appellant's Opening Brief. pp. 9-10)

We argued that this threw a doubt on the validity of the processing and that there was therefore presented a doubt concerning the proof of guilt.

Appellee argues that "an examination" of the Coordinator's testimony indicates no irregularity. . . ."

We submit that when members of one panel may be working (doubtless as a matter of administrative convenience) on registrants of another panel that this is a grave irregularity by reason of the regulations, §1604. 52 a(e), last sentence, set forth in our Opening Brief on page nine.

The same kind of an irregularity was present in an unreported case decided June 27, 1967 by the Honorable A. Andrew Hauk, Judge Presiding in *U.S.A.* v. *Carl Dean Wilson*, No. 468—Criminal. After finding the defendant not guilty the court said to the United States Attorney: "And I would suggest you tell the board that they had better watch how they do these things because I will dump them again if they come back with one panel member signing for another panel member."

(At this time court was adjourned.)

III.

OUR INDUCTION PROCESSING POINT

We argued that the record showed reversible irregularity.

Appellee argues we, "failed to mention any examples" and that there was "an absence of substantial deviation from the normal practice."

It is true that our Opening Brief only gave the page and line of the oral testimony and the pages of the Selective Service file.

We now mention and particularize:

The oral testimony on this starts on page 22 of the reporter's transcript. We put the government's exhibit (the Selective Service file) before the witness, the defendant. He testified that sheets 61 and 62 of the exhibit were incorrect in that (1) they didn't "give" him the oath at the time and place where the exhibit, pages 61 and 62, stated [Rep. Tr, 22, lines 21-], (2) he was taken out of the room [Rep. Tr. 22, lines 7-10], (3) he was then given the oath privately [Rep. Tr. 23, lines 24-25]. This is contrary to AR 601-270, the regulation that controls, in that the oath is to be given *only* after induction, that is, after the act of stepping forward. (4) He was not given the warning of the penalty [Rep. Tr. 24, and 25, lines 3 and 4].

We showed, in our Opening Brief, that it has been held that such a failure is fatal. There was no cross-examination on this particular failure although the induction ceremony was covered by two pages of questioning and the cross-examiner showed the same indifference to the necessity of the penalty explanation as the unrebutted testimony of defendant showed was true of the inducting officers.

Judge Jertberg had a similar situation, as a District Judge on January 21, 1958, in *U.S.A.* v. *Lindsay*, No. 3496—N.D. at Fresno. His filed opinion, in its portion pertaining to our point says:

"In *Chernekoff* v. *United States,* 219 F. 2d 721 (Ninth Circuit) the court stated at page 725, referring to the Army regulation:

> "One purpose of this regulation is self-evident. It is intended to give a registrant a last clear chance to change his mind and accept induction rather than certain indictment and possible conviction for a felony carrying a maximum punishment of five years or a fine of not more than $10,000 or both. The regulation is couched in mandatory, not discretionary, language."

The plaintiff contends that in the absence of evidence to the contrary, it must be presumed that the defendant was advised by the induction officials that the offense of refusing to submit to induction would subject the defendant to punishment by imprisonment for not more than 5 years or a fine of not more than $10,000, or both, because of the presumption that public officials perform their duties according to law. The vice in this argument is that even if the letter (Plaintiff's Exhibit No. 1, page 21) does not overcome the presumption of regularity in showing that the induction officials did not follow the regulation, the letter raises a reasonable doubt that the regulation was followed. "This doubt might have been overcome if the government had elected to call as witnesses the induction officials who might have testified that the warning given the defendant included the nature and extent of the possible punishment." The government, however, elected to stand on the Selective Service file. It may well be that if the defendant had been advised of the severity of the punishment that he would have changed his mind. As the Court in the *Chernekoff*

case, at page 725, stated: "It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulation to seriously reflect and to let actions speak louder than words."

In this case, the defendant is presumed to be innocent until his guilt has been established beyond a reasonable doubt. Under the evidence in this case, and giving to the defendant the presumption of innocence to which he is entitled, I am compelled to state that I have a reasonable doubt that the defendant was given the required warning. The warning given him simply stated that conviction would subject him to punishment. He was entitled to know the severity and extent of the punishment which might have had the effect of causing the defendant to change his mind.

In connection with the third ground of the motion for judgment of acquittal, the defendant contended that the file failed to disclose that he had taken the "loyalty oath". During the course of the trial, the loyalty oath was produced from the induction center, and received in evidence as Plaintiff's Exhibit I-A. After viewing the oath as signed by the defendant, his counsel abandoned this contention.

The facts and the law in this case require that the motion of the defendant for judgment of acquittal be granted and it is so ordered. Judgment of acquittal of the defendant will be entered and the bond of the defendant exonerated.

The Clerk of this Court is directed to forthwith mail copies of this order to counsel.

DATED: January 17, 1958.

GILBERT H. JERTBERG
Judge, United States District Court

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney for Appellant

EXHIBIT "A"

SELECTIVE SERVICE SYSTEM

Notice of Right to Personal Appearance and Appeal

(Seal) Approval Not Required

Local Board No. 101
Los Angeles County
1301 Westwood Blvd.
Los Angeles, Calif. 90024
(Local Board Stamp)

Gary D. Standard
3042 Earlmar Dr.
Los Angeles, Calif. 90064

Date of mailing
May 19 1967
(Month) (Day) (Year)
Selective Service No.
4 | 101 | 48 | 526

Enclosed is your Notice of Classification. Your right to ask for a personal appearance or an appeal within 30 days is prescribed on the reverse side of this Notice.

Each local board has available a Government Appeal Agent to aid you with a personal appearance, an appeal, or any other procedural right. The Appeal Agent or his representative will give you legal counsel at no charge.

If you should desire a meeting with him, this office will arrange a time and place for such meeting upon request.

The Government Appeal Agent for this local board is:

Name Alfred H. Krieger.

/s/ Anne C. Phillips
Anne C. Phillips
Clerk of Local Board

EXHIBIT "B"

SELECTIVE SERVICE SYSTEM

Notice of Appointment

(Seal) Approval Not Required.

Local Board No. 114
Los Angeles County
11214 So. Brookshire Ave.
Downey, Calif. 90241
(Local Board Stamp)

Joel Laurance Nossoff
11454 E. Winchell Street
Whittier, California 90606

Date of mailing
July 12, 1967
(Month) (Day) (Year)
Selective Service No.
4 | 114 | 46 | 1919

The appointment you have requested has been arranged with Mr. McManus Government Appeal Agent at 11214 So.
(Name) (Title)
Brookshire, Downey, California on July 24, 1967 at 2:30 p.m.
(Place of appointment) (Date) (Hour)

/s/ M. Okerstrom
Marguerite Okerstrom
Executive Secretary of Local
Board Group "E"

IMPORTANT NOTICE

This appointment is made to enable you to take advantage of the advice and assistance of a member of the uncompensated staff of your selective service local board.

These officials, Government Appeal Agents, Associate Government Appeal Agents, and Advisors to Registrants, are available to every selective service registrant. They are appointed to give you advice and assistance in any selective service matter. If you have moved from the area of your own local board, you may contact any local board for information.

The local board with which you are registered will retain jurisdiction over you, even though you should move from the geographic area of the local board. You should notify your local board of any change of address or any change in your status which could change your classification.

It is important that you keep the appointment scheduled above. If you are unable to do so, contact the local board clerk immediately, giving the reason you are unable to appear, and request another appointment, if desired.

EXHIBIT "C"

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1724 F Street NW.
Washington, D.C. 20435

Address Reply To
(Seal) The Director of Selective Service

MEMORANDUM TO GOVERNMENT APPEAL AGENTS
(No. 1)

ISSUED: March 6, 1967

1. This is the first of a series of Memorandums to Government Appeal Agents. The purpose is to advise Government Appeal Agents with respect to legal trends in Selec-

tive Service, their relationship to the Director's policies, and the impact of particular decisions on the administration of the selective service law.

2. It has been reported to me that some registrants have been confused regarding their appeal rights, and the process of taking an appeal, and were not aware that a Government Appeal Agent was available to advise them. I have now issued a Local Board Memorandum which will require the local board to notify each registrant who is placed in either Class I-A, I-A-O, or I-O that this advice is available, giving the name of the Government Appeal Agent. If advice is sought the local board clerk will arrange for a meeting.

3. I appreciate very much the loyal and unselfish service which has been rendered to the Nation by our Government Appeal Agents. It is hoped that the comments and reports on current legal problems and trends which will appear in future issues of these memorandums will be of assistance by saving the time that Appeal Agents now spend in research in order to keep familiar with decisions in selective service cases which have been handed down since the last edition of "Legal Aspects of Selective Service." This publication was issued for the use of Government Appeal Agents and was last revised in 1963. I urge your continued, but perhaps more vigorous, assistance to registrants.

/s/ Lewis B. Hershey
Director

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PETITION FOR REHEARING

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THE CLASSIFICATION SITUATION

There are two subdivisions to this point, and both merit further thought.

A. One reason given by the court, for rejecting a consideration of his conscientious objection point is that, in the Court's words:

> "He was apparently not interested in appealing in order to obtain the conscientious objector classification (class I-O) that he here claims should have been granted him, since the record indicates that he would not have accepted the civilian work assignment required for persons so classified. See 32 C.F.R. § 1660.20." [slip op. p. 3, n. 2]

This reasoning flies in the teeth of this Court's opinion in *Franks* v. *United States*, 9 Cir. 1954, 216 F.2d 266:

> "We are not unaware of the high probability that Franks, had he been classified I-A-O, would nevertheless have refused induction and ultimately found himself indicted in much the same manner as has happened here. Perhaps the local board and the hearing officer and the appeal board also had the feeling that they might as well classify the appellant as I-A for the reason that like other Jehovah's Witnesses he would probably refuse induction as a I-A-O.
>
> [2] It is our view, however, that it was not for the local board, any more than it is for this court, to say that the registrant should not be placed in a certain classification merely because he did not want that classification or was seeking a lower class or would probably refuse to acquiesce in such a classification." [269]

B. The other reason was that the Court held it was precluded from considering this point because of a failure to appeal. It is true there is an abundance of authority for this position. It is also true that an argument is present (1) that the exhaustion rule was not meant for young men, without (and forbidden) counsel but was developed by the courts for corporations and (2) that the Supreme Court hasn't yet passed on it. In short, what the courts have constructed the courts can dismantle.

Counsel further represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. Tietz
Attorney for Appellant

June 9, 1968